Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTHBROOK PROPERTY AND
CASUALTY INSURANCE COMPANY

Petitioner,

vs.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OR, IN THE ALTERNATIVE, BRIEF OF AMICUS CURIAE NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

In April 1989, Bennie and Joann Edwards obtained an asbestos-injury judgment against The Celotex Corporation in the Northern District of Texas, which judgment was affirmed by the Fifth Circuit and was secured pending appeal by a supersedeas bond. Thereafter the bankruptcy court in the Middle District of Florida — which presides over the Celotex Chapter 11 reorganization case — entered an injunction, under Section 105 of the Bankruptcy Code, prohibiting all persons from, *inter alia*, executing on supersedeas bonds that Celotex had posted. Notwithstanding the bankruptcy court's injunction (and without seeking relief or appeal therefrom within the Eleventh Circuit), the Edwards obtained an order from the Texas district court, under Fed. R. Civ. P. 65.1, permitting execution against the surety on the bond, and the Fifth Circuit affirmed. The questions presented are:

A. Whether the Fifth Circuit's decision to permit execution on the bond is in conflict with applicable precedent of this Court holding that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order," *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (citations omitted); and

B. Whether the Fifth Circuit's collateral attack on, and interference with, the injunction of a bankruptcy court in another circuit violates established principles of comity and federal jurisdiction and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

LIST OF PARTIES

The parties to the proceedings below are identified in the caption of the case. Although not formally named as a party in the proceedings below, Northbrook Property and Casualty Insurance Company[1] has an interest in the outcome of this litigation because Northbrook is the surety on the supersedeas bond at issue here and is the surety on other bonds Celotex posted. As a result, Northbrook is petitioning for leave to intervene to file a petition for a writ of certiorari or, in the alternative, is filing this Brief as *amicus curiae* in support of Celotex's petition for a writ of certiorari.[2]

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[1] Northbrook is a wholly-owned subsidiary of Allstate Insurance Company, which is a wholly-owned subsidiary of The Allstate Corporation, which is wholly owned by Allstate Holdings, Inc., 80% of which is owned by Sears, Roebuck and Co.

[2] Northbrook participated in the proceedings in the United States District Court for the Northern District of Texas by filing Northbrook Property and Casualty Insurance Company Memorandum In Opposition To Motion For Release Of Supersedeas Bond and by participating in the filing of a Joint Status Report. (A-25.)

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No. _____

IN THE

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OCTOBER TERM, 1993

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS and JOANN EDWARDS,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, OR, IN THE ALTERNATIVE, BRIEF OF AMICUS CURIAE NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Northbrook Property and Casualty Insurance Company ("Northbrook") prays for leave to intervene and further prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in *Edwards v. Armstrong World Indus., Inc.*, on November 5,

1993, and the denial of Celotex's petition for rehearing and suggestion for rehearing *en banc*, entered on December 22, 1993. In the alternative, Northbrook files this Brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, filed by Celotex, in accordance with Rule 37 of the Rules of this Court and pursuant to the attached consent of all parties.

OPINIONS BELOW

The Fifth Circuit's opinion as to execution on the supersedeas bond (A-1) is reported at 6 F.3d 312. The Fifth Circuit's denial of the petition for rehearing and suggestion for rehearing *en banc* (A-19) is reported at 6 F.3d 321. The order of the district court (A-24) is unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on November 5, 1993, affirming the decision of the United States District Court for the Northern District of Texas. On December 22, 1993, the Fifth Circuit entered its order denying Celotex's petition for rehearing and suggestion for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Federal Rule of Civil Procedure 65.1, 11 U.S.C. §105(a) and 28 U.S.C. §§ 158(a), 1334(b):

Fed. R. Civ. P. 65.1

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

11 U.S.C. §105(a).

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

28 U.S.C. §158(a).

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

28 U.S.C. § 1334(b)

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

REASONS FOR GRANTING LEAVE TO INTERVENE, AND, IN THE ALTERNATIVE, INTEREST OF AMICUS CURIAE

Northbrook petitions for leave to intervene because it has a vital interest in not being subjected to conflicting orders, from two federal courts in different circuits, as to execution rights on a surety bond Northbrook has issued. In the event that the Court denies Northbrook leave to intervene to file its petition for a writ of certiorari, Northbrook files this Brief as *amicus curiae* in support of Celotex's petition.

Northbrook and its parent, Allstate Insurance Company (jointly "Northbrook"), are authorized to write supersedeas bonds in all 50 states. They have obtained in excess of $20 million in bonds on behalf of Celotex and its wholly-owned subsidiary, Carey Canada Inc. (jointly "Celotex"), to permit appeals from judgments against Celotex in asbestos cases. At Celotex's request, and pursuant to a settlement agreement resolving an insurance coverage dispute, Northbrook, as surety, posted a bond to supersede the judgment of Joann and Bennie Edwards ("Edwards") against Celotex (the "Edwards Bond").

Thereafter Celotex filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida (the "bankruptcy court"), and the bankruptcy court entered an order enjoining execution on the Celotex bonds (the "Section 105 Injunction"). *See generally*

In re Celotex Corp., 128 B.R. 478 (Bankr. M.D. Fla. 1991); *In re Celotex Corp.*, 140 B.R. 912 (Bankr. M.D. Fla. 1992). Both Edwards and Northbrook are defendants in an adversary proceeding in the bankruptcy court, *The Celotex Corp. v. Allstate, et al.*, Adv. Pro. No. 92-584, in which Celotex asserts that 229 bonded claimants, including Edwards, should not be permitted to execute on the bonds, in whole or in part, because the punitive damage portions of certain judgments can be voided and because the bonded claimants — by virtue of the bonds and their collateralization — are beneficiaries of Celotex asset transfers that are avoidable as preferences and fraudulent transfers. *See* 11 U.S.C. §§ 544, 547, 548, 550.

Edwards did not seek relief in the bankruptcy court from the Section 105 Injunction and did not seek review of that order within the Eleventh Circuit. Instead, Edwards went to a court in another circuit to seek an order permitting what the bankruptcy court prohibited.

Notwithstanding the Section 105 Injunction, the Fifth Circuit's decision permits Edwards to execute against Northbrook on the Edwards Bond. If Northbrook pays on the Edwards Bond, however, it risks violation of the bankruptcy court's Section 105 Injunction. Yet, Northbrook cannot — consistent with the Fifth Circuit's decision — resist payment. The ramifications of the disagreement between the bankruptcy court and the Fifth Circuit escalate as others of Celotex's 229 bonded judgment claimants are emboldened by the Fifth Circuit's decision to attempt execution on their bonds. Northbrook already has participated in a number of such proceedings spawned by the Fifth Circuit's decision.

Northbrook is not filing this Brief to support or oppose the merits of the Section 105 Injunction. Northbrook never sought an injunction against execution on the Edwards Bond or any other bond it provided for Celotex. Northbrook has been, and is today, willing to pay on the Edwards Bond provided that

payment is not in contravention of court order. Northbrook has no interest in avoiding payment on the bonds it obtained for Celotex. Under the terms of a settlement agreement with Celotex, such payment would simply reduce *pro tanto* Northbrook's insurance settlement obligation to Celotex. Indeed, pursuant to the May 29, 1992 order of the bankruptcy court, Northbrook has placed sufficient funds (in excess of $20,000,000) in a special account to assure payment on the bonds Northbrook obtained at Celotex's request. 140 B.R. at 917.

Northbrook files this Brief to emphasize the importance of adherence to a rule of law that prevents collateral judicial attack and requires that injunctions be obeyed unless they are overturned through appropriate appellate process. Without intervention from this Court, Northbrook and other Celotex sureties (who collectively issued $70,000,000 in supersedeas bonds for Celotex) remain caught between conflicting decisions of two courts in two different circuits.

STATEMENT OF THE CASE

This is a case of direct interference by a federal court of appeals with the continuing injunctive power of a bankruptcy court in a different circuit.

A. The Underlying Tort Judgment

In April of 1989, the United States District Court for the Northern District of Texas entered a $281,025.80 judgment in favor of Edwards and against Celotex for asbestos-related injuries. The bulk of the jury award, $245,500, was for punitive damages. Diversity jurisdiction was invoked under 28 U.S.C. § 1332.

Celotex appealed the punitive damage award. To stay execution on the judgment pending appeal, Celotex posted a

supersedeas bond for $294,987.88. Northbrook was surety on the bond. The bond was secured with insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, the Fifth Circuit affirmed Edwards' judgment against Celotex. *Edwards v. Armstrong World Indus., Inc.*, 911 F.2d 1151 (5th Cir. 1990). On October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

B. The Bankruptcy Court Section 105 Injunction

Celotex is a manufacturer of building and roofing products. On October 12, 1990, Celotex had over 100 asbestos-related bodily injury cases on appeal. Celotex had stayed judgments totalling nearly $70 million by posting supersedeas bonds, for which it had provided security. *See Celotex*, 140 B.R. at 913-14; *Celotex*, 128 B.R. at 482-83.

On October 17, 1990, on Celotex's motion, the bankruptcy court issued an injunction under Section 105 of the Bankruptcy Code to augment the automatic stay. In pertinent part, the Section 105 Injunction states that "all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of ... whether the matter is on appeal and a supersedeas bond has been posted ...." (Order ¶ 3, A-35.) As stated by the bankruptcy court, the Section 105 Injunction "was for the purpose of precluding, among other things, judgment creditors from proceeding in various state and federal courts against supersedeas bonds without first coming before this Court." 128 B.R. at 482 (footnote omitted). The order provided that any party in interest could seek relief from its restraints upon 30 days' notice and hearing. (Order ¶ 4, A-35.)

C. Further Bankruptcy Court Proceedings Concerning Its Injunction

On June 13, 1991, the bankruptcy court reaffirmed the Section 105 Injunction and made clear that the injunction prohibits execution on any supersedeas bond even after the appellate process had concluded:

> As to the utilization of Section 105 vis-a-vis the supersedeas bonds, once the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the Section 105 stay in this Court.
>
> * * *
>
> Accordingly, it is:
>
> ORDERED, ADJUDGED AND DECREED that:
>
> * * *
>
> 3. Where at the time of filing the petition, the appellate process between Debtor and the judgment creditor had been concluded, the judgment creditor is precluded from proceeding against any supersedeas bond posted by Debtor without first seeking to vacate the Section 105 stay entered by this Court.

128 B.R. at 484, 485; *accord Celotex*, 140 B.R. at 914.

The bankruptcy court ruled that a supersedeas bond ceases to be estate property once the appellate process has concluded in favor of the bonded claimant. 128 B.R. at 482. The court recognized, however, that the bonded claimants' judgments and

their rights to execute on the bonds nevertheless could be avoidable on bankruptcy law grounds and that the punitive damage awards were subject to subordination and equitable limitation in bankruptcy:

> The Court's inquiry into whether the Section 105 stay should continue includes, *inter alia*, Debtor's ability to avoid any final judgment under the Bankruptcy Code, the necessity of protecting or disenfranchising Debtor's sureties, Debtor's ability to deal with the asbestos litigation within the reorganization plan and the effect on that process if the Section 105 stay were to be lifted, the treatment of the punitive damage portion of any judgment and the treatment of joint and several liability, contribution, and indemnification from co-defendants in other litigation.

Celotex, 140 B.R. at 914.

Again, on May 29, 1992, the bankruptcy court reaffirmed the Section 105 Injunction. 140 B.R. 912. The court made clear that the purpose of the injunction was to assure its ability to grant Celotex relief on its avoidance claims, if appropriate, while at the same time protecting the bonded claimants. *Id.* at 916. To expedite resolution of any such claims, the court ordered:

> ORDERED, ADJUDGED AND DECREED that Debtor shall file any preference action or any fraudulent transfer action or any other action to avoid or subordinate any judgment creditor's claim against any judgment creditor or against any surety on any

> supersedeas bond within 60 days of the entry of this Order.

Celotex Corp., 140 B.R. at 917.[3]

As to Celotex's compliance with this bankruptcy court order, Celotex advised the Fifth Circuit:

> As required by the second reported *Celotex* decision at 140 B.R. 912, the Edwards, all other bonded claimants and the sureties on such bonds are presently involved in an omnibus adversary proceeding in *The Celotex Corp. v. Allstate, et al.*, Adv. Pro. No. 92-584, United States Bankruptcy Court, Middle District of Florida, Tampa Division, to resolve whether any or a part of the collateral securing the bonds can be avoided as preferential payments or fraudulent transfers or equitably subordinated to the claims of all other unsecured asbestos victims' claims. Because the Edwards' judgment includes punitives and the timing of the posting of the bond is implicated in the adversary proceeding, the Edwards' entitlement to have the judgment satisfied in full is at issue pursuant to 11 U.S.C. §544 (fraudulent transfer) and 11 U.S.C. §510(c) (equitable subordination). Certainly Congress contemplated avoiding preferential

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[3] To protect the bonded claimants, the bankruptcy court ordered that: (a) the sureties involved, including Northbrook, establish interest-bearing accounts sufficient to assure full payment of the bonds; (b) Celotex create an interest-bearing reserve account or increase the face amount of any supersedeas bond to cover the full amount of judgment through confirmation; and (c) Celotex provide in any plan that the bonded claimants' claims be paid in full unless otherwise determined by the Court or agreed by the claimant. 140 B.R. at 917.

> transfers to sureties on supersedeas bonds as evidenced by 11 U.S.C. §547(d)....

See Celotex's Suggestion For Rehearing, in the United States Court of Appeals for the Fifth Circuit, at 7 n.5.

D. Proceedings Below (Within The Fifth Circuit)

1. The Motion in Texas for Release of the Bond

On May 3, 1991, Edwards filed a motion in the Texas district court under Fed. R. Civ. P. 65.1 seeking to release the supersedeas bond against Northbrook. Celotex and Northbrook (which had been served with the motion) opposed the motion, asserting that any proceeding to enforce the bond had been enjoined by the bankruptcy court. Northbrook also urged its interest in the orderly administration of justice:

> Northbrook's interest here is in the orderly administration of justice. The status of the bonds is *sub judice* in the bankruptcy court that is supervising the entire Celotex reorganization. Northbrook has a vital interest in not being subjected to conflicting court decisions concerning the supersedeas bonds. It also has an interest in the status of the bonds being decided economically, efficiently and expeditiously.

Northbrook Property and Casualty Insurance Company Memorandum In Opposition To Motion For Release of Supersedeas Bond, filed May 21, 1991 in the Northern District of Texas, at 6.

On February 3, 1992, at the request of the Texas district court, Celotex, Northbrook and Edwards filed a Joint Status Report. A-25. They advised the district court of the bankruptcy court's June 13, 1991 order and that the bankruptcy court had

held that judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the October 17, 1990 Section 105 Injunction, which remained in effect. A-27.

Despite the Section 105 Injunction, on May 27, 1992 the district court granted Edwards' motion for release of the supersedeas bond. The court entered a brief order without written opinion or analysis. A-24.

2. The Fifth Circuit Decision

On November 5, 1993, the Fifth Circuit affirmed. It denied Celotex's petitions for rehearing and rehearing *en banc* on December 22, 1993.

The Fifth Circuit recognized that this is a case of conflict between coordinate federal courts (the Florida bankruptcy court and the Texas district court) as to the same matter. A-2; 6 F.3d at 314. The Fifth Circuit purported to resolve the conflict; "no usurpation is intended in this decision ...." *Id.* The court focused, however, on the jurisdiction of the bankruptcy court — and specifically whether the Section 105 Injunction fell within the bankruptcy court's exclusive jurisdiction under 28 U.S.C. § 1334(d) (exclusive jurisdiction over debtor's property and property of the estate) or the bankruptcy court's nonexclusive jurisdiction under 28 U.S.C. § 1334(b) (nonexclusive jurisdiction over "all civil proceedings arising under title 11, or arising in or related to cases under title 11"). A-5-6; 6 F.3d at 315.

Since the Florida bankruptcy court had already determined that bonds outstanding on concluded appeals, like the Edwards Bond, were not property of the estate, the answer was self-evident. A-10; 6 F.3d at 317. Bankruptcy court jurisdiction was not exclusive.

The Fifth Circuit, however, did *not* analyze collateral attack warfare between two coordinate federal courts when (as here) *both* courts have jurisdiction over the same matter. Instead, on rehearing, the court of appeals merely adverted to the existence of a court deadlock, with the following statement:

> Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have appellate jurisdiction, was right.

A-20; 6 F.3d at 321.

The bulk of the Fifth Circuit opinion is devoted to the merits of the Florida bankruptcy court's exercise of Section 105 equity power.[4] "We must decide what limits must be placed on the [Florida] bankruptcy court's power to insure that both debtors and creditors remain adequately protected." A-2; 6 F.3d at 314.

The Fifth Circuit questioned whether the Section 105 Injunction even applied to the present case. In the court's view, the order "does not, on its face, reach to third parties." A-12; 6 F.3d at 318. The court recognized, however, "the bankruptcy court in this case has ruled that the stay, in its present state, would apply to enjoin the Edward's [sic] proceedings against Northbrook to execute the supersedeas bond." A-12-13; 6 F.3d at 318 (citing *Celotex*, 128 B.R. at 484).

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[4] The court of appeals rejected the argument that the automatic stay, under Section 362(a) of the Code, bars execution on the Edwards Bond. A-6-10; 6 F.2d at 316-17. The court reasoned that the automatic stay could not apply because the bond was not estate property and because execution on the bond was against Northbrook, a non-debtor. *Id.*

In light of the bankruptcy court's construction and reiteration of its own order, the Fifth Circuit set forth its own legal analysis of the injunction merits. The Fifth Circuit held that the Section 105 Injunction constituted an abuse of the bankruptcy court's equity power because the injunction defeated the purpose of the supersedeas bond. "The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this case, insolvency of the judgment debtor." A-14; 6 F.3d at 319. The court expressly rejected the reasoning and result of the Fourth Circuit's decision in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1846 (1993). "[W]e disagree with the Fourth Circuit's proposed solution in *Willis*." A-13; 6 F.3d at 319. *Willis*, as the Fifth Circuit acknowledged, "decided that the bankruptcy court's power was sufficient to stay proceedings against third parties on supersedeas bonds." A-11; 6 F.3d at 318.

The Fifth Circuit acknowledged that "[s]ection 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate." A-15; 6 F.3d at 320 (citation omitted). The appellate court concluded, however, that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." A-15-16; 6 F.3d at 320 (footnote omitted).

In reaching this conclusion, the Fifth Circuit did not consider potential rights of Celotex (which Celotex has asserted) to recover the bond proceeds. The Fifth Circuit did not advert to or analyze the possibility that execution on the bond could result in a bonded claimant's receipt of a preference or fraudulent transfer as beneficiary of a transfer of the bond collateral. *See* 11 U.S.C. § 550(a). Nor did it raise the issue of punitive damages. No mention or analysis was accorded the bankruptcy court's May 29, 1992 Order that Celotex file avoidance actions as to the bonded claimant's rights, as Celotex has done. (See *supra*, at 9-10.)

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT'S DECISION TO PERMIT EXECUTION ON THE EDWARDS BOND IS IN CONFLICT WITH APPLICABLE PRECEDENT OF THIS COURT AND OF THE FIFTH CIRCUIT.

This Court has established that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (citations omitted); *accord United States v. United Mine Workers of America*, 330 U.S. 258, 293-94 (1947). As the Fifth Circuit itself teaches:

> Whether the grant of the injunction was erroneous is not the question here. Error must be corrected by appeal, and cannot be tested by disobedience. ... Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court.

Locke v. United States, 75 F.2d 157, 159 (5th Cir.) (citations omitted) (affirming contempt order for defendant's violation of injunction, notwithstanding defendant's assertions as to its invalidity, where court issuing injunction had jurisdiction and defendant elected not to seek review of injunction by appeal), *cert. denied*, 295 U.S. 733 (1935).

The bankruptcy court here had jurisdiction to issue the Section 105 Injunction. As shown by the bankruptcy court's June 1991 and May 1992 published opinions, the purpose of the Section 105 Injunction is to assure the Court's ability to grant just and effective relief as to avoidance and subordination

claims pertaining to the bonds, the bond collateral and punitive damage awards, as well as to protect Celotex's ability to reorganize. *See* 140 B.R. at 915-17; 128 B.R. at 482-84. Whether or not the bankruptcy court abused its discretion in issuing and maintaining the Section 105 Injunction, its jurisdiction (*i.e.*, its actual power) to issue the injunction is unquestionable.

The bankruptcy courts, as adjuncts of the federal district courts, have broad jurisdiction encompassing all civil proceedings "arising under title 11, or arising in or related to cases under title 11 [Bankruptcy Code]." *See* 28 U.S.C. §1334(b).[5] There is abundant authority holding that suits to enjoin non-debtors from taking actions that interfere with a debtor's ability to maximize the value of its estate and reorganize are core bankruptcy proceedings. *See, e.g., In re Johns-Manville Corp.*, 801 F.2d 60, 64 (2d Cir. 1986) (action to enjoin debtor's stockholders from prosecuting state court action to compel debtor to hold shareholders' meeting).[6] Moreover, temporary

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[5] *See also* 28 U.S.C. § 157(b)(2), which provides a non-exclusive listing of core bankruptcy proceedings. As a general matter, a case "arising under title 11," *i.e.*, created or determined by a statutory provision of title 11, is a core bankruptcy proceeding. *In re Wood*, 825 F.2d 90, 96 (5th Cir. 1987). A case "arising in" a bankruptcy proceeding, *i.e.*, an administrative matter that arises only in a bankruptcy case, is also a core matter. *Id.* at 97.

[6] *See also In re Stadium Management Corp.*, 95 B.R. 264, 267 (D. Mass. 1988) (action to enjoin bank from foreclosing on property owned by debtor's subsidiary); *In re Deltacorp., Inc.*, 111 B.R. 419, 420 (Bankr. S.D.N.Y. 1990) (action to enjoin government from appointing receiver for S & L owned by a holding company of which the debtor is the 53% parent); *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 753-54 (Bankr. E.D. Pa. 1986) (action to compel initial purchasers of oil from debtor (i) to comply with "division orders" which established how proceeds of oil were to be divided up and (ii) not to pay sums to lien creditors of debtor who had valid lien against oil and its proceeds; according to court, this proceeding involved "non-estate funds held by third-parties").

and permanent Section 105 injunctions barring suit against non-debtors, issued as core matters and often as part of a Plan, are an accepted aspect of large corporate reorganization.[7]

Given the bankruptcy court's jurisdiction to enter and keep in place the Section 105 Injunction, the only method for review of the validity of the injunction is by appeal to the United States District Court for the Middle District of Florida and then the Eleventh Circuit. *See Locke*, 75 F.2d at 159. As this Court explained in *Howat v. State of Kansas*, 258 U.S. 181, 189-90 (1922) (emphasis added; citations omitted):

> An injunction duly issuing out of a court of general jurisdiction with equity powers, upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them, however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming, but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, *and until its decision is reversed for error by orderly review,*

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[7] *See, e.g., In re A.H. Robins Co.*, 880 F.2d 694, 702 (4th Cir.) (affirming power of bankruptcy court to enjoin suits against non-debtors, where there existed certain indemnification rights against the debtor), *cert. denied*, 493 U.S. 959 (1989); *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir.) (permanent injunction may be issued against actions against an insurer as part of settlement incorporated in a Chapter 11 plan), *cert. denied*, 488 U.S. 868 (1988); *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992) (upholding validity of bankruptcy court's Section 105 stay of execution against surety on supersedeas bonds), *cert. denied*, 113 S.Ct. 1946 (1993); *In re Myerson & Kuhn*, 121 B.R. 145, 153-54 (Bankr. S.D.N.Y. 1990) (Section 105 grants power to enjoin actions against debtor's partners, where such actions would significantly interfere with debtor's ability to formulate a plan); *In re Otero Mills, Inc.*, 21 B.R. 777 (Bankr. D. N. Mex.) (granting §105 injunction to prevent creditor from proceeding on judgment against debtor's president), *aff'd*, 25 B.R. 1018 (D.N. Mex. 1982).

> *either by itself or by a higher court, its orders based on its decision are to be respected,* and disobedience of them is contempt of its lawful authority, to be punished.

Accord Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 439-40 (1976) ("[T]hose who are subject to the commands of an injunctive order must obey those commands, notwithstanding eminently reasonably and proper objections to the order, until it is modified or reversed.").

The Fifth Circuit's decision, permitting Edwards to ignore the bankruptcy court's injunction, conflicts with clear precedent of this Court and of the Fifth Circuit itself.

II. THE FIFTH CIRCUIT'S COLLATERAL ATTACK ON, AND INTERFERENCE WITH, THE BANKRUPTCY COURT'S INJUNCTION VIOLATES ESTABLISHED PRINCIPLES OF COMITY AND FEDERAL JURISDICTION AND CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Both Northbrook and Edwards are subject to conflicting court orders. If the Edwards take further steps to execute on the bond, they face contempt sanctions in the Florida bankruptcy court. If Northbrook refuses to pay on the bond, it faces enforcement process in the Northern District of Texas. No litigant in the federal system should be confronted with such choices. Exercise of this Court's supervisory power is necessary to break the deadlock.

The decision of the Fifth Circuit constitutes a radical departure from the accepted and usual course of judicial proceedings. Comity and orderly administration of justice dictate that coordinate federal courts not hear the same matter simultaneously. *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952). Actions to vacate an injunction should

be brought to the rendering court or by appeal from the rendering court, not by original action in a coordinate federal court. *See Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir.), *cert. denied*, 379 U.S. 404 (1964). "[C]onsiderations of comity and orderly administration of justice demand that the non-rendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there." *Id.* at 172.[8]

The instant collateral attack on the Florida bankruptcy court is unseemly. Already collateral attack has resulted in two directly opposite federal appellate decisions (*Willis* and *Edwards*) as to the correctness of the Section 105 Injunction — neither from the Eleventh Circuit, the only federal circuit with appellate jurisdiction over the bankruptcy court. Under 28 U.S.C. § 158(a), an appeal from the bankruptcy court "shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." Accordingly, the United States District Court for the Middle District of Florida has *exclusive* appellate jurisdiction here. Further appeal is to the United States Court of Appeals for the Eleventh Circuit. *See* 28 U.S.C. § 158(a).

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[8] Numerous federal decisions respect this principle. *See, e.g., Carter v. United States*, 733 F.2d 735, 736 (10th Cir. 1984) (one district court is without jurisdiction to grant relief from an injunction entered by a district court sitting in another circuit), *cert. denied*, 469 U.S. 1161 (1985); *accord Carter v. Attorney General of the United States*, 782 F.2d 138, 142 (10th Cir. 1986) (same); *Treadaway v. Academy of Motion Picture Arts and Sciences*, 783 F.2d 1418, 1421-22 (9th Cir. 1986) (considerations of comity provide ample justification for district court's dismissal of action to set aside bankruptcy court order confirming sale); *Feller v. Brock*, 802 F.2d 722, 727-28 (4th Cir. 1986) ("Prudence requires that whenever possible, coordinate courts should avoid issuing conflicting orders."); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (for reasons of comity and sound judicial administration, one federal district court must not issue injunction that interferes with ability of another federal district court to supervise its own injunction).

A system that permits appeal from one federal trial judge to another in a different circuit — as has happened here — ultimately impugns the entire appellate system. It encourages forum shopping and evasion of the rules and statutes governing federal appeals.

The Florida bankruptcy court is performing its judicial duties in accordance with applicable statutes and rules. Unless and until that court's injunctive orders are reversed on appeal, they should be obeyed. *See Howat v. State of Kansas*, 258 U.S. 181, 190 (1922) (until the injunction-rendering court's "decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected"); *Ellicott Mach. Corp. v. Modern Welding Co., Inc.*, 502 F.2d 178 (4th Cir. 1974) (review of district court order is by appeal to the appropriate circuit court, not by collateral attack to another federal trial judge).

CONCLUSION

For the foregoing reasons this petition for leave to intervene and petition for writ of certiorari should be granted. In the alternative, the petition for writ of certiorari filed by The Celotex Corporation should be granted.

Respectfully submitted,

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Dated: March 22, 1994

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Bennie EDWARDS and Joann Edwards,
Plaintiffs-Appellees,

v.

ARMSTRONG WORLD INDUSTRIES, INC., *et al.*, *Defendants,*

The Celotex Corporation,
Defendant-Appellant.

No. 92-1557.

United States Court of Appeals,
Fifth Circuit.

Nov. 5, 1993.

Before POLITZ, Chief Judge, GOLDBERG and EDITH H. JONES, Circuit Judges.

GOLDBERG, Circuit Judge:

This case epitomizes the way that toxic tort litigation has corroded our judicial system. Here we have an asbestos poisoning dispute in which the defendant has sought the protection of the bankruptcy laws to shield itself from the multitude of claims generated by this one-time miracle fabric turned cancer-causing nightmare. To the bankruptcy court now falls the herculean task of managing the problems generated by the unprecedented magnitude of these disputes. It is this court's duty to insure that the case management tools the bankruptcy court utilizes to control these conflicts do not overwhelm its primary obligation to dispense justice.

The precise question before us centers around the power of bankruptcy courts to stay proceedings pending in other courts which might have some effect on the ability of the bankruptcy judge to manage the estate. The Bankruptcy Code provides judges with those equitable powers essential to serving the twin aims of bankruptcy law; protecting the debtor from the tentacles of his or her creditors and, fair distribution of the estate. See H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6296-97. We must decide what limits must be placed on the bankruptcy court's power to insure that both debtors and creditors remain adequately protected.

No usurpation is intended in this decision to denigrate the powers of the bankruptcy court, nor did we intend any trespass upon the metes and bounds of bankruptcy courts' treasured turfs. Indeed, neither side to this controversy has a perpetual lease or any tenure of ownership that is infrangible and indestructible. It is not a struggle between any potential usurpers. Instead, both the district court and the bankruptcy court should both use what they think are appropriate transits and calipers in surveying their jurisprudential turfs.

While cognizant of the repercussions that our opinion may have on other disputes, parties, etc., we should be careful to make decisions based only upon the merits of the particular cases before us. In the instant case, plaintiffs wish to execute a supersedeas bond against a non-bankrupt surety. Because the appeal for which the bond was posted has terminated, the bankrupt and therefore also the bankruptcy court have lost any control over this asset. Consequently, we decline to extend the reach of the bankruptcy court's authority to stay these proceedings and we affirm the ruling of the district court in releasing the supersedeas bond to the plaintiffs.

I. Facts

In April of 1989, the United States District Court for the Northern District of Texas entered a $281,025.80 judgment in favor of Bennie and Joann Edwards and against the Celotex Corporation ("Celotex") for asbestos-related injuries. To stay execution on this judgment while pursuing an appeal, Celotex posted a supersedeas bond for $294,987.88. Northbrook Property and Casualty Insurance Company ("Northbrook") served as surety on the bond. Northbrook, also Celotex' insurer, secured their participation in the bond using insurance proceeds remaining to be paid to Celotex under a settlement agreement resolving coverage disputes between Northbrook and Celotex.

In an opinion issued on September 20, 1990, this court affirmed the plaintiff's judgment against Celotex. Edwards v. Armstrong World Indus., Inc., 911 F.2d 1151 (5th Cir. 1990). Celotex did not move for rehearing or a stay of the mandate and, on October 12, 1990, the mandate issued. That same day, Celotex filed a petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida.

The filing of Celotex' Chapter 11 petition automatically stayed the continuation of all "proceedings against any of the Debtors" and the commencement of "any act to obtain possession of property of any of the Debtors." 11 U.S.C. §§ 362(a)(1) and (3). On October 17, 1990, the bankruptcy judge augmented the protection afforded the Debtors by the automatic stay, employing the broad equitable powers available to bankruptcy judges under 11 U.S.C. § 105. The bankruptcy judge issued an order staying

all proceedings against Celotex, including those proceedings where "the matter is on appeal and a supersedeas bond has been posted by the Debtors."[1]

On May 3, 1991, the plaintiffs filed a motion in the district court seeking to enforce the supersedeas bond against Northbrook as surety on the bond. See Fed.R.Civ.P. 65.1.[2] Northbrook and Celotex opposed this motion, asserting that any proceeding to execute the bond was stayed by the Celotex bankruptcy.

However, let us be absolutely clear that the bankruptcy court's order does not, on its face, apply to the proceedings to execute the supersedeas bond against Northbrook. A careful reading of the bankruptcy court's order reveals that it forbids all proceedings or claims involving the debtor, and makes no

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[1] See Order Granting Emergency Motion for Determination of Applicability of § 362 Stay to Pending Matters Or, in the Alternative, for Extension of § 362 Stay Pending Matters. The pertinent section of this order reads: "3. Notwithstanding any exceptions or limitations to the automatic stay contained in § 362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors."

[2] Federal Rule of Civil Procedure 65.1 states, "Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action."

reference to proceedings against third parties. Thus the section 105 stay would not, as written, prevent the district court from executing the bond against Northbrook.[3]

The district court entered the Bond Order on May 27, 1992 granting execution against Northbrook on the bond. Thereafter, Celotex filed its notice of appeal.

II. Jurisdiction

The threshold question in this appeal is whether the district court had jurisdiction to determine the applicability of the bankruptcy court's stay. Celotex argues that the district court lacked jurisdiction to consider the plaintiffs' motion to execute the supersedeas bond because the bankruptcy court in Florida, where Celotex' Chapter 11 case is pending, has exclusive jurisdiction over all issues related to the bankruptcy. 28 U.S.C. § 1334(a) and (d). The difficulty underlying the determination of whether the district court had jurisdiction to hear the plaintiffs' motion is that this issue turns on the question of whether the bond is part of the Debtor's estate. However, this question is bound up in the merits of appellant's claim.

The jurisdictional grant of 28 U.S.C. § 1334(d) gives the bankruptcy court "exclusive jurisdiction of all of the property,

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[3] As a relevant aside, we take note of the fact that the bankruptcy court in this case held that the stay as issued does apply to the proceedings in this case. See In re Celotex Corp., 128 B.R. 478, 484 (Bankr.M.D.Fla. 1991) ("[w]here bankruptcy courts in 'mega' cases such as this are required to deal with complex litigation involving numerous parties, joint and several liability, and multi-million dollars in claims and assets, not to mention potential conflicts with other judicial determinations, the powers of the bankruptcy court under Section 105 must in the initial stage be absolute.")

wherever located, of the debtor as of the commencement of such case."[4] This jurisdictional grant is limited by section 1334(b) which provides that the bankruptcy court only has "original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11." 28 U.S.C. 1334(b) (emphasis added). Thus we can rephrase the first question presented in this appeal as follows: whether the district court's order implicates property of the estate and therefore falls under the exclusive jurisdiction of the bankruptcy court or instead is considered a merely a related matter over which the district court could properly exercise jurisdiction.

This court has previously held that district courts have jurisdiction to determine whether a bankruptcy court stay applies to proceedings before it. In Hunt v. Bankers Trust Co., this court ruled that the issue of whether "the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court." 799 F.2d 1060, 1069 (5th Cir. 1986) (citing *In re Baldwin-United Corp. Litigation*, 765 F.2d 343, 347 (2d Cir. 1985)); *see also, Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990) (district courts retain jurisdiction to determine applicability of stay of litigation pending before them). The district court had jurisdiction to evaluate whether the motion to execute the supersedeas bond would fall under the exclusive jurisdiction of the bankruptcy court.

III. Automatic Stay

We now turn to whether the automatic stay, 11 U.S.C. 362(a), prevents the district court from proceeding with the execution of the supersedeas bond. The automatic stay provisions

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[4] The bankruptcy courts sit under the auspices of the district court in the jurisdiction for which they operate. 28 U.S.C. § 157(a).

of the Bankruptcy Code enable bankruptcy courts to take control of all of the assets of the debtor giving the court opportunity to survey the landscape of debtor's financial condition before reorganizing the estate. *Hunt v. Bankers Trust Co.*, 799 F.2d at 1069.

A victorious plaintiff who obtains a bare judgment against a defendant becomes an unsecured judgment creditor of that defendant. The judgment is payable immediately, but a defendant may obtain stay of execution on the judgment by posting a supersedeas bond. See Fed.R.Civ.P. 62(d). A defendant who posts a supersedeas bond retains a reversionary interest in the bond subject to divestment.

In many cases, the supersedeas bond will be posted by a third party. *See e.g. Southmark Corp. v. Riddle* (*In re Southmark Corp.*) 138 B.R. 820, 824-25 (Bankr.N.D.Tex. 1992). In exchange for agreeing to post the supersedeas bond, the third party normally takes some sort of security from the judgment debtor. Id. In this case, Northbrook acted as surety on the bond securing its interest with insurance proceeds from Celotex' policy with Northbrook. See In re Celotex Corp., 128 B.R. at 480.

Celotex argues that as the judgment debtor, it has an identity of interest with Northbrook as the surety of the supersedeas bond. Therefore, they reason that the bankruptcy court was justified in applying section 362 to stay any proceeding against Northbrook. Celotex cites the Fourth Circuit decision in A.H. Robbins Co. v. Piccinin (*In re A.H. Robbins*) in which the court held that "'there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants' . . . . [This occurs] when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." 788 F.2d 994, 999 (4th

Cir. 1986), *cert. denied* 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) (citing *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (Bankr. S.D.N.Y. 1983)).

Celotex argues that because Northbrook received a security interest in the insurance proceeds, releasing the bond to the plaintiffs will allow Northbrook to automatically recover its rights to those proceeds. This result would diminish the total amount available to be paid out to the remaining claimants. Therefore, appellants ask us to allow the bankruptcy court to stay execution on the supersedeas bonds in order to preserve as much of the debtor's estate as possible.

The wording of section 362(a) belies Celotex' argument. The statute states that the automatic stay is applicable to "(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor . . . (3) any act to obtain possession of property of the estate." Thus the statute limits the bankruptcy court to stays in only those proceedings in which the debtor or his or her property is in controversy. Because this is suit against Northbrook, not the bankrupt, the only way the automatic stay could apply is if the court finds that the bond is property of the debtor's estate.

We recognize that the Bankruptcy Code defines property of the estate quite broadly to include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. 541(a)(1). *See U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983) (holding that the definition of property of the estate includes property in which debtor no longer has a possessory interest). Nevertheless, we do not believe that this definition is so broad as to include the kind of interest under consideration in the present case.

In considering the same issue in a case involving another

asbestos claimant to the Celotex estate, the court in *Willis v. Celotex Corp.* rejected Celotex' reasoning, stating that the guarantor has a duty "separate from and independent of Celotex' duty to pay the judgments." 978 F.2d 146, 148 (4th Cir. 1992) *cert. denied* ____ U.S. ____, 113 S.Ct. 1846, 123 L.Ed.2d 470 (1993). Because there was no identity of interest between Celotex and its guarantor, the proceedings against the guarantor of the supersedeas bond were not stayed under § 362(a)(1). Id. at 149. The obligations of a surety are sufficiently independent to provide the basis of an action by the judgment creditor to collect on the bond unfettered by the automatic stay provisions of the Bankruptcy Code.

In an analogous case this court decided that any payments made under a secured letter of credit do not constitute property of the debtor. *Kellogg v. Blue Quail Energy Inc. (In re Compton Corp.)* 831 F.2d 586, 589 (5th Cir. 1987), modified on other grounds, 835 F.2d 584 (1988) ("When the issuer honors a proper draft under a letter of credit, it does so from its own assets and not from the assets of [the debtor] who caused the letter of credit to be issued."). Because the letter of credit is not part of the Debtor's estate, we ruled that the bankruptcy court could not enjoin a payment of funds from the letter of credit to the beneficiary. Id. This court reasoned that central to the letter of credit is the independence principle in which the "issuers obligation to the letter of credit beneficiary is independent from any obligation between the beneficiary and the issuer's customer." *Id.* at 590.

The concerns which the court considered relevant to the letter of credit are similarly relevant to the surety-debtor relation at issue here. In re Southmark, 138 B.R. at 828 ("the supersedeas bond or undertaking on appeal resembles the secured letter of credit"). The promise of the bank to pay on a letter of credit is indistinguishable from Northbrook's promise to act as surety on the supersedeas bond. In both cases the promise is to perform an obligation of the debtor when and if the debtor becomes unable

to do so itself. The surety's obligation on a supersedeas bond once the appeal has been completed is as separate and independent from the principal's obligation, as is the bank's obligation on a letter of credit. Thus the automatic stay provisions of § 362(a) do not apply to the guarantor of a supersedeas bond because the bond is not property of the bankrupt's estate once the bond has matured and become enforceable. It was therefore proper for the district court to allow the judgment plaintiffs to execute the supersedeas bond against the surety as a separate and independent obligor on the debt.

The bankruptcy court holding jurisdiction over Celotex' bankruptcy itself admitted that "[w]here a debtor, upon the filing of the bankruptcy petition, is an unsuccessful appellant in the total appellate process, or during the bankruptcy case is unsuccessful in its appeal, its property interest in the bond can be divested and any efforts by the debtor to prevent the judgment creditor from proceeding against the supersedeas bond must be sought under Section 105 of the Bankruptcy code." *In re Celotex Corp.*, 128 B.R. at 482. In this case, because the appeal has been completed and mandate issued, the claim Celotex may have once had on the supersedeas bond has thereby terminated.

This opinion should not be read to infer that the bankruptcy court lacked authority to issue a stay order over supersedeas bonds generally. Our decision today is limited to the holding that the bankruptcy court lacked authority over this particular supersedeas bond. Because the appellate process had been completed and Celotex no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, the automatic stay provisions will not prevent Northbrook from fulfilling its obligation.

While we need not state the precise reach of § 362(a) to third parties, we hold that the automatic stay cannot be invoked to paralyze judgment creditors from pursuing the surety of a supersedeas bond once the debtor has lost the appeal for which the bond was posted.

IV. Section 105 Stay

Turning now to the more difficult issue raised by this appeal, we confront the question of whether the equitable powers granted bankruptcy courts apply to the type of non-debtor third parties present here.

Celotex argues that section 105 of the Bankruptcy Code gives bankruptcy courts virtually limitless ability to bring parties to heel to its authority. Section 105(a) states, in part, that the bankruptcy "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." In *In re S.I. Acquisition, Inc.* this court recognized that a bankruptcy court has broad discretionary power under section 105 to affirmatively stay proceedings in other courts. 817 F.2d 1142, 1146 n.3 (5th Cir. 1987); *Wedgeworth v. Fibreboard Corp.* 706 F.2d 541, 545 (5th Cir. 1983).

The jurisdiction of bankruptcy courts has been extended to include stays on proceedings involving third parties under the auspices of 28 U.S.C. § 1334(b) which provides for jurisdiction of the bankruptcy court for matters "related to a case under title 11."[5] Appellant argues that under this jurisdictional grant, the equitable powers of the bankruptcy court are sufficient to stay a proceeding to release the supersedeas bond.

The Fourth Circuit in *Willis*, examining the very same section 105(a) order at issue in this case, decided that the bankruptcy court's power was sufficient to stay proceedings

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[5] In considering the question of whether co-defendants are included within a § 105 stay, this court held that § 105 "does empower the bankruptcy court to stay proceedings against non-bankrupt entities." In re S.I. Acquisition, 817 F.2d at 1146 n. 3. See also MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 93 (2nd Cir. 1988) (section 105 allows stays against third party insurers).

against third parties on supersedeas bonds. The court based its reasoning upon the "magnitude of the task [the bankruptcy court] faced in attempting to oversee the bankruptcy proceedings, resulting from the sheer number of pending personal injury cases in which supersedeas bonds had been posted." 978 F.2d at 149. The number of cases against Celotex is, in fact, quite staggering. Over 141,000 asbestos related bodily injury claims were pending against the debtor Celotex at the time it filed for bankruptcy. *In re Celotex Corp.*, 128 B.R. at 480. Of those, over 100 cases had appeals pending, in support of which Celotex claims to have posted over $70 million in supersedeas bonds. *Id.* In light of the "extraordinary facts presented by the Celotex bankruptcy" 978 F.2d at 147, the Willis court concluded that a stay of proceedings to prevent enforcement of supersedeas bonds was a proper exercise of the bankruptcy court's authority under section 105(a).

It is important to remember that the section 105 stay issued by the bankruptcy court does not, on its face, reach to third parties. Thus, taking the bankruptcy court at its word, we are unable to see how the section 105 order could reasonably be applied to the present proceedings which involve a separate and independent third party obligation. The bankruptcy court stay was written to apply only to the debtor and its property. As we have shown in the preceding section, the property of the debtor cannot be extended to include the separate obligations of a non-bankrupt surety. Our decision in *Blue Quail* is particularly relevant as to the separateness of guaranty obligations from the property of a debtor's estate.

However, this court has at times found it appropriate to broadly construe bankruptcy court stays to apply beyond the property of the debtor. In re Davis, 730 F.2d 176, 183 (5th Cir. 1984) (exercising the bankruptcy court's stay powers against non-debtor third parties when the proceedings in question "pose a significant threat to the estate.") Indeed, the bankruptcy court in this case has ruled that the stay, in its present state, would apply

to enjoin the Edward's proceedings against Northbrook to execute the supersedeas bond. *In re Celotex Corp.*, 128 B.R. at 484. The bankruptcy court has decided that even when, "the judgment creditor has been successful throughout the appellate process, the judgment creditor is not able to proceed against the supersedeas bond without seeking to vacate the section 105 stay in this Court." *Id.*

Therefore, we cannot simply assume that because Northbrook does not appear to be included on the face of the stay, the bankruptcy court will exempt it from the reach of the stay. The issue presented in this appeal must then be sharpened to the question of whether prudential (or other) considerations justify extending the bankruptcy court's jurisdiction to the point where it includes the power to stay the proceedings in question here.

The Supreme Court has made clear the importance of placing definite limits on the equity powers of bankruptcy courts. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81, 102 S.Ct. 2858, 2876, 73 L.Ed.2d 598 (1982) (plurality opinion) (holding that because bankruptcy courts are non-Article III courts they must be limited in function and authority). This court has itself previously limited the powers of bankruptcy courts in *Wedgeworth v. Fibreboard Corp.* where we held that, "[a]lthough we recognize the court's broad discretion in this area, such control is not unbounded. Proper use of this authority calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.'" 706 F.2d at 545 (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S.Ct. 163, 165-6, 81 L.Ed. 153 (1936)).

While we recognize the burdens which have been placed upon the bankruptcy court by the immensity of litigation pending in this case, we disagree with the Fourth Circuit's proposed

solution in *Willis*. We believe that we cannot afford to shut down the dispensation of justice simply because there is a bankruptcy.[6] Although the idea of using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest. We cannot globalize the bankruptcy court's authority in this manner.

Celotex made a promise to the prevailing plaintiffs (and the court) by posting the supersedeas bond that the bond would "secure[ ] the prevailing party against any loss sustained as a result of being forced to forgo execution on a judgment during the course of an ineffectual appeal." Poplar Grove Planting and Refining Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979); Federal Prescription Service, Inc. v. American Pharmaceutical Association 636 F.2d 755 (D.C.Cir. 1980) (describing the purpose of supersedeas bond to secure appellee in cases where there is some chance of the judgment debtor being unable or unwilling to satisfy the judgment). Supersedeas bonds serve as an obligation on an appellant to insure that an appellee who is deprived of the immediate opportunity to collect his or her judgment will not be prejudiced by the delay.

Allowing appellant to file for bankruptcy and thereby stay execution on the supersedeas bond would eviscerate the very purpose of these bonds. Once the appeal is decided and mandate has issued, the judgment creditor has an enforceable right to collect that which the trial court has previously determined is rightfully his or her own. The supersedeas bond was posted to cover precisely the type of eventuality which occurred in this

---

[6] The court in Willis expressed the hope that the bankruptcy court will quickly rule on the motion for relief from the stay. 978 F.2d at 149 n. 5. At this point, aspirations for an expeditious resolution appear quixotic at best.

case, insolvency of the judgment debtor. It is manifestly unfair to force the judgment creditor to delay the right to collect with a promise to protect the judgment only to later refuse to allow that successful plaintiff to execute the bond because the debtor has sought protection under the laws of bankruptcy.

Furthermore, this argument is buttressed by the fact that it is the purpose of the surety relation to provide creditors with another avenue to pursue the debt. Becoming the surety on the supersedeas bond, Northbrook took the place of the judgment creditor in bearing the risk that Celotex would be unable to pay the debt. See Blue Quail, 831 F.2d at 589-90. (holding that for letters of credit, "the shifting of liability to the bank rather than to the [creditor] is the main purpose of the letter of credit. After all, the bank is in a much better position to assess the risk of its customer's insolvency."). If we permit Northbrook to escape its liability by taking refuge under the protective umbrella of Celotex' Title 11 bankruptcy proceedings, we would thereby doubly disappoint the Edwards plaintiffs by first delaying their judgment under a supersedeas bond which they can no longer execute and then, second, failing to enforce the promise made by Northbrook to guarantee that bond. We should not, unless absolutely compelled, let such an unjust result stand. There are no such compulsions here.

Section 105 authorizes a bankruptcy court to enjoin litigants from pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate. *In re Davis*, 730 F.2d at 184. However, the integrity of the estate is not implicated in the

present case because the debtor has no present or future interest in this supersedeas bond.[7] Whatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which the debtor has no interest. Because the appeal has terminated and mandate issued, the surety's liability on the bond matured and the judgment creditors should be allowed to collect.

In coming to the opposite conclusion from the decision we reach today, the Willis court held that the "hiatus from execution on the bonds was necessary to permit the bankruptcy court to take control of the immense litigation." 978 F.2d at 150. The idea of hiatus employed by the Fourth Circuit parallels the intent Congress manifested in providing equitable powers to the bankruptcy court in the first place. The power to stay proceedings in other courts was intended as a provisional measure to afford "the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions." 1978 U.S.C.C.A.N. at 6296-97. In order that this breathing spell not suffocate the creditor's claims, we must take care to insure that the hiatus not extend to the point where it becomes a permanent vacation.

---

[7] The status of the surety agreement which allegedly gives Northbrook a collateralized interest in insurance proceeds owed to the debtor Celotex is not sufficiently demonstrated to suggest that Northbrook and Celotex indeed have an identity of interest such that executing against Northbrook would be the same as proceeding against the property of the debtor. In this respect, the bankruptcy court was correct when it held that "whether a debtor can reject or assume the surety agreement or avoid it and thus seek return of the collateral may be an issue solely between the debtor and its surety." In re Celotex, 128 B.R. at 481.

In addition, we lack evidence of the effect of the agreement between Celotex and Northbrook other than generalized statements by Celotex unrelated to the situation of these plaintiffs. We cannot base a decision on a document that was not presented to the court.

In this case, the judge granted the original stay almost three years ago. The complexities of this litigation make it likely that a satisfactory and fair dispensation of Celotex' assets will be a long time coming. We cannot allow the concern for resolving the monstrous tangle of conflict and contradiction to overwhelm our duty to do justice to these plaintiffs. Due to the likelihood of any stay becoming a perpetual prohibition on plaintiffs collecting their judgment, we hold that the stay is not within the equitable powers of the bankruptcy court for the situation at bar.

These plaintiffs have survived many long years fighting through the system. On October 12, 1990, they emerged with what appeared to be a final victory in this protracted litigation. Greeting them was Celotex, postponing the plaintiff's relief with the claim that because there are so many other victims of this terrible poison, the Edwards will have to postpone yet again the day in which they receive what is their due. It is our job to see that they wait no longer. The Edwards were specifically promised by the court and by Celotex that they could look to the supersedeas bonds if they won on appeal and we should be careful to see that their expectations are not nullified because of a generalized and theoretical concern for the bankrupt's estate.

We conclude by calling attention one last time to the fact that this circuit in *Blue Quail* did not bow in complete obeisance to a bankruptcy court stay. Fairness and equity require that we also not bow in this case where the Edwards' claim is all the more compelling. Having completed the appellate process before the debtor went into bankruptcy, the supersedeas bond matured, and the district court acted properly in executing the bond against Northbrook.

V.

For the reasons stated above, we AFFIRM.

EDITH H. JONES, Circuit Judge, specially concurring:

I agree wholeheartedly with Judge Goldberg's analysis showing the inapplicability of the § 362 stay to this case and with his interpretation of the plain meaning of the Celotex bankruptcy court's § 105 stay order. Because the § 105 stay order did not purport to reach the district court's order against Northbrook in this case, however, I would not reach the question of the bankruptcy court's power to issue such an order.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1557

BENNIE EDWARDS AND JOANN EDWARDS,

Plaintiffs-Appellees,

versus

ARMSTRONG WORLD INDUSTRIES, INC., ET. AL.,

Defendants,

THE CELOTEX CORPORATION,

Defendant-Appellant.

Before POLITZ, Chief Judge, GOLDBERG and JONES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

A few explanatory words are offered. Appellants contend that we should not collaterally attack an order of a bankruptcy court sitting under the jurisdiction of the Eleventh Circuit. This contention fails for two reasons. Primarily, the bankruptcy court's order does not purport to reach the proceedings in this case and therefore executing the supersedeas bond does not infringe on the Eleventh Circuit's proper jurisdiction. Secondarily, our opinion merely declares this court's power to protect and preserve supersedeas bonds posted in our district courts. Thus, we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we do have appellate jurisdiction, was right.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS AND JOANN EDWARDS,	§	
Plaintiffs,	§	
VS.	§	C. A. No. 7-87-0050
THE CELOTEX CORPORATION, ET AL.,	§	
Defendants.	§	

NOTICE OF APPEAL

Notice is hereby given that The Celotex Corporation, Defendant, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order authorizing the execution and the supersedeas bond that was entered in this action on the 27th day of May, 1992.

DATED: June 25, 1992

Respectfully submitted,

BUTLER & BINION, A
Registered Limited Liability Partnership

By: /s/_____
Kevin F. Risley
State Bar No. 16941200
1600 First Interstate Bank Plaza
Houston, Texas 77002-5008
(713) 237-3293
FAX (713) 237-3201

ATTORNEYS FOR APPELLANT
THE CELOTEX CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to all counsel of record:

Mr. Brent M. Rosenthal
Baron & Budd, P.C.
The Centrum
3102 Oak Lawn Avenue
Suite 1100
Dallas, Texas 75219

Northbrook Property and
Casualty Insurance Company
51 W. Higgins Rd.
South Barrington, Illinois 60010
Attn: Surety Bond Dept.

by certified mail, return receipt requested, on this 25th day of June, 1992.

/s/
Kevin F. Risley

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and	§	
JOANNE EDWARDS	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. 7-87-0050
THE CELOTEX	§	
CORPORATION, ET AL.	§	

ORDER

CAME ON TO BE HEARD plaintiffs' Motion for Release of Supersedeas Bond, and the court, being advised of the premises, is of the opinion that said motion has merit and should be granted. It is therefore

ORDERED that plaintiffs may execute on the supersedeas bond executed by Northbrook Property and Casualty Insurance Company on May 17, 1989 to secure the judgment entered in plaintiffs' favor against the Celotex Corporation in the above styled and numbered cause.

Signed this 27th day of May, 1992.

/s/
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

BENNIE EDWARDS and JOANN EDWARDS,	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. CA7-87-050-K
EMPIRE ACE INSULATION MFG. CORP., ET AL.,	§	
Defendants.	§	

JOINT STATUS REPORT

COME NOW Plaintiffs, Defendant Celotex Corporation, the only defendant remaining in this case, and Northbrook Property and Casualty Insurance Co., the surety on the supersedeas bond posted by Defendant Celotex Corporation, and submit their Joint Status Report in accordance with this Court's order of January 14, 1992. The parties respond to the Court's inquiries as follows:

(1) A brief statement of the nature of the case, including the contentions of the parties;

This case was settled between plaintiffs and all defendants except Celotex Corporation ("Celotex"). The case was tried to a jury in April of 1989. On April 17, 1989, upon the jury's verdict, the court entered judgment in plaintiffs' favor and against Celotex in the amount of $280,753.80. Upon Celotex's request,

Northbrook Property and Casualty Company ("Northbrook"), as surety, joined Celotex in issuing a supersedeas bond in the amount of $294,097.88 to stay execution of the judgment pending appeal. Celotex appealed the judgment to the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment in a reported opinion. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). Celotex did not file a petition for rehearing, and the Fifth Circuit issued its mandate of affirmance to this court on October 12, 1990. On the same date, Celotex filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Middle District of Florida. On October 17, 1990, in response to an emergency motion filed by Celotex, the bankruptcy court entered an order pursuant to §105 of the bankruptcy code enjoining all entities "from commencing or continuing any judicial, administrative or other proceeding involving the Debtors, regardless of who initiated the proceeding, whether the matter is on appeal and a supersedeas bond had been posted by the Debtors, or, the appellant in the appeal was one of the Debtors."

On or about May 3, 1991, plaintiffs filed a motion in this case under Rule 65.1 of the Federal Rules of Civil Procedure, seeking leave of court to enforce the terms of the supersedeas bond posted on behalf of Celotex by Northbrook. Northbrook filed a memorandum in opposition to the motion on or about May 21, 1991, and Celotex filed a response in opposition to the motion on or about May 22, 1991. Celotex and Northbrook took the position that plaintiffs' effort to enforce the supersedeas bond is a proceeding against the debtor in bankruptcy and against the property of the bankruptcy estate that the

bankruptcy court has the power to enjoin, and that the bankruptcy has enjoined the type of motion asserted by plaintiffs in this case by its order dated October 17, 1990. On June 13, 1991, the bankruptcy court entered its Omnibus Order on Motion To Lift Stay with Regard to Celotex Appeals and To Release Supersedeas Bonds Thereon which held, *inter alia*, (1) a supersedeas bond is property of the estate during the appeal; (2) judgment creditors of Celotex are enjoined from proceeding on any supersedeas bond without first vacating the §105 stay; and (3) the October 17, 1990 §105 stay remained in effect. On July 29, 1991 Celotex filed a supplemental response in opposition to plaintiffs' motion advising the court of this order. On August 5, 1991, the court invited the plaintiffs to reply to Celotex's supplemental response, and plaintiffs did so. Plaintiffs' motion to enforce the supersedeas bond remains pending, and disposition of the motion is the only action that remains for the court in this case.

(2) Any challenge to jurisdiction or venue;

Celotex argues that this proceeding is stayed by operation of 11 U.S.C. §362(a) and by express injunction issued by the bankruptcy court. Celotex and Northbrook take the position that the bankruptcy court is the appropriate and exclusive forum to determine whether the bankruptcy stay should be lifted and that the bankruptcy court has exclusive jurisdiction over the property of the estate pursuant to 28 U.S.C. §1334(a) and 28 U.S.C. §157. Plaintiffs take the position that the bankruptcy court has no jurisdiction to restrain plaintiffs' collection efforts against third parties such as Northbrook, which is properly before the court under Fed.R.Civ.P. 65.1.

No other challenge to the jurisdiction or venue of this court has been asserted.

(3) A brief description of all pending motions, including the dates the motions and any responses thereto were filed;

Plaintiffs' Motion for Release of Supersedeas Bond, filed on or about May 3, 1991;

Celotex's Response in Opposition to Motion for Release of Supersedeas Bond, filed on or about May 22, 1991;

Northbrook's Memorandum in Opposition to Motion for Release of Supersedeas Bond filed on or about May 21, 1991;

Celotex's Supplemental Response to Plaintiff's Motion for Release of Supersedeas Bond, filed July 29, 1991; and

Plaintiffs' Reply to Celotex's Supplemental Response, filed on or about August 20, 1991.

(4) A brief description of any matters which require a conference with the Court;

Plaintiffs believe that their Motion for Release of Supersedeas Bond may be appropriate for a hearing or conference with the Court. Defendant maintains that any such hearing or conference would violate the automatic stay of 11 U.S.C. §362(a).

(5) An assessment of the likelihood that other parties will be joined, identities of potential parties and an estimate of the time needed for joinder of such parties;

Not applicable.

(6) An estimate of the date by which discovery can be completed;

Not applicable.

(7) Whether a jury has been demanded;

Not applicable.

(8) Whether the parties will consent to trial (jury or nonjury) before a U.S. Magistrate Judge.

Not applicable.

(9) (a) An assessment of the prospects for settlement,

(b) The status of any settlement negotiations already conducted, and

(c) The specific date, place and time of a formal settlement conference at which the parties and their counsel shall appear *in person* to discuss settlement of this case;

Not applicable.

(10) Whether the case is ready for trial and the anticipated length of trial;

Not applicable.

(11) Any other matters relevant to the status and disposition of this case.

None.

Respectfully submitted,

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By: _____

ROBERT B. MILLNER
Counsel for Northbrook Casualty
and Insurance Company
[Mr. Millner approved the substance
of this Report but did not review
and approve the final draft].

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Status Report has been circulated to all counsel of record by telecopier and by regular mail on this 3rd day of February, 1992.

/s/_____
BRENT M. ROSENTHAL

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN RE:	Chapter 11
THE CELOTEX CORPORATION, et al.,	Consolidated Case Nos.: 90-10016-8B1 and 90-10017-8B1
Debtors. _____/	

ORDER GRANTING EMERGENCY MOTION FOR DETERMINATION OF APPLICABILITY OF §362 STAY TO PENDING MATTERS OR, IN THE ALTERNATIVE, FOR EXTENSION OF §362 STAY TO PENDING MATTERS

THIS CAUSE came before the Court upon the Debtors' Motion for Determination of Applicability of §362 Stay to Pending Matters or, in the Alternative, for Extension of §362 Stay to Pending Matters (the "Motion"). There being no objection hereto by the United States Trustee, and the Court having considered the Motion, the arguments of counsel regarding the merits of the Motion, the record in the case and being otherwise duly advised in the premises, finds that this Court pursuant to 28 USC §1471(e), has exclusive jurisdiction of all of the property of The Celotex Corporation and Carey Canada Inc., wherever located, and that this Court, pursuant to §§105 and 362 of the Bankruptcy Code, may issue any order, process or judgment as may be necessary or appropriate to carry out the provisions of the Bankruptcy Code and sufficient cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. Debtors' Motion be, and the same is, hereby granted.

2. All persons (including individuals, partnerships and corporations, and all those acting for or on their behalf), and all governmental units (including the United States of America and any State, Commonwealth, District, Territory, municipality, department, agency or instrumentality of the United States, a State, a Commonwealth, a District, a Territory, a municipality, a foreign state, or other foreign or domestic governments, and all those acting for or on their behalf and all other entities (collectively, "Entities") be and each of them are hereby stayed, restrained and enjoined from:

a. Commencing or continuing, including issuing or employing process, any judicial, administrative or other proceeding against any of the Debtors that was or could have been commenced before the commencement of the Debtors' Chapter 11 cases, or recovering a claim against any of the Debtors that arose before the commencement of the Debtors' Chapter 11 cases;

b. Enforcing, against any of the Debtors or against property of any of the Debtors, a judgment obtained before the commencement of the Chapter 11 cases;

c. Taking any act to obtain possession of property of any of the Debtors or of property from any of the Debtors;

d. Taking any act to create, perfect or enforce any lien against property of any of the Debtors;

e. Taking any act to create, perfect or enforce against property of any of the Debtors, any lien to the extent that such lien secures a claim that arose before the commencement of the Chapter 11 cases;

f. Taking any act to collect, assess, or recover a claim against any of the Debtors that arose before the commencement of the Chapter 11 cases; and

g. Offsetting any debt owing to any of the Debtors which arose before the commencement of the Chapter 11 cases against any claim against any of the Debtors.

3. Notwithstanding any exceptions or limitations to the automatic stay contained in §362(b) of the Code, all Entities are hereby jointly and severally stayed, restrained and enjoined from commencing or continuing any judicial, administrative or other proceeding involving any of the Debtors regardless of (a) who initiated the proceeding, (b) whether the matter is on appeal and a supersedeas bond has been posted by the Debtors or (c) the appellant in an appeal is one of the Debtors.

4. On request of a party in interest, and after not less than thirty (30) days' written notice to the attorneys for the Debtors, and after a hearing, this Court may consider granting relief from the restraints imposed herein in the event that it be deemed necessary, appropriate and warranted to so terminate, annul, modify or condition the injunctive relief granted herein.

5. The automatic stay under §362 of the Bankruptcy Code and as extended by this Order operates to stay the continuation of pending matters only as against The Celotex Corporation and Carey Canada Inc. and does not operate to stay the continuation of such matters as against any other named

defendant therein unless proceedings under the Bankruptcy Code have been commenced by or against such other named defendant.

DONE AND ORDERED at Tampa, Florida, on October 17, 1990.

/s/
Thomas E. Baynes, Jr.
United States Bankruptcy Judge

cc: Jeffrey W. Warren, Esq.
Lynne L. England, Esq.
Debtors

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March 14, 1994

VIA TELCOPY AND
FEDERAL EXPRESS

Brent M. Rosenthal, Esq.
Baron & Budd, P.C.
3102 Oak Lawn Avenue
Suite 1100
Dallas, TX 75219

Re: Edwards v. Celotex

Dear Mr. Rosenthal:

This is to confirm our conversation in which you agreed to consent to Northbrook Property and Casualty Insurance Company's filing of an amicus brief in support of the Debtor's petition for a writ of certiorari in the above-captioned matter. Pursuant to Supreme Court Rule 37, I am requesting that you sign, on the line provided below, to confirm in writing your consent to the filing of this amicus brief. After you have done so, please return the document to me.

Very truly yours,

SONNENSCHEIN NATH & ROSENTHAL

By: Lorie A. Chaiten
Lorie A. Chaiten

LAC/lkh

Brent M. Rosenthal, attorney
for the Debtor

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March 14, 1994

VIA FEDERAL EXPRESS

Jeffrey W. Warren, Esq.
Bush Ross Gardner Warren
& Rudy, P.A.
220 S. Franklin St.
Tampa, FL 33602

Re: Edwards v. Armstrong World Industries Inc., et al.
(6 F.3d 312 (5th Cir. 1993).)

Dear Mr. Warren:

Please confirm, by signing below, that Petitioner The Celotex Corporation consents to the filing of an amicus curiae brief by the Northbrook Property and Casualty Insurance Company in connection with the petition for writ of certiorari filed in the above-referenced case. The consent should be returned to my attention.

Very truly yours,

Robert B. Millner
Counsel for the Northbrook Property
and Casualty Insurance Company

RBM/hlf/71298

CONSENT TO FILING OF AMICUS BRIEF:

By: _____
Jeffrey W. Warren

(2) (2)

Nos. 93-1504 and 93-1563

Supreme Court, U.S.
FILED
APR 25 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

No. 93-1504

THE CELOTEX CORPORATION,

Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,

Respondents.

No. 93-1563

NORTHBROOK PROPERTY AND CASUALTY INSURANCE COMPANY,

Petitioner,

v.

BENNIE EDWARDS AND JOANN EDWARDS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF IN OPPOSITION

BRENT M. ROSENTHAL
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Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTION PRESENTED

Whether Rule 65.1 of the Federal Rules of Civil Procedure allows enforcement of a supersedeas bond, posted to stay execution of judgment against a defendant that filed for reorganization after the judgment became final, against the non-bankrupt surety that issued the bond, even though a bankruptcy court in another circuit has attempted to restrain execution on supersedeas bonds posted in favor of the debtor under section 105(a) of the Bankruptcy Code.

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Martin v. Wilkes, 490 U.S. 755 (1989) 7

Willis v. Celotex Corp., 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993) 4, 5, 6, 9

STATUTES AND RULES

11 U.S.C. § 105(a) 1, 3, 5, 6

11 U.S.C. § 362(a) 3

Fed.R.Civ.P. 62(d) 1, 2, 10

Fed.R.Civ.P. 65.1 ..... 1, 2, 10

STATUTES AND RULES INVOLVED

11 U.S.C. § 105(a) provides, in pertinent part,

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Rule 62(d) of the Federal Rules of Civil Procedure provides,

> **Stay Upon Appeal.** When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Rule 65.1 of the Federal Rules of Civil Procedure provides, in pertinent part,

> Whenever these rules . . . require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiciton of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action.

STATEMENT OF THE CASE

More than five years ago, a federal jury in Wichita Falls, Texas found that Petitioner The Celotex Corporation ("Celotex") tortiously caused Respondent Bennie Edwards to sustain serious personal injuries, and awarded Bennie Edwards and his wife Joanne compensatory and punitive damages. The United States District Court for the Northern District of Texas entered judgment on the jury's verdict on April 17, 1989. To stay immediate execution of the judgment pending appeal, Celotex posted a supersedeas bond executed by Petitioner Northbrook Property and Casualty Insurance Company ("Northbrook") pursuant to Rule 62(d) of the Federal Rules of Civil Procedure. The terms of the bond require Northbrook to pay the judgment, plus specified interest, if the judgment is affirmed and Celotex does not pay it. The district court approved the bond on June 6, 1989. Some fifteen months later, the Fifth Circuit affirmed the judgment. *Edwards v. Armstrong World Industries, Inc.*, 911 F.2d 1151 (5th Cir. 1990). The Fifth Circuit's mandate, making the judgment final and enforceable, issued October 12, 1990. That same day, Celotex filed a petition for reorganization in the United States Bankruptcy Court for the Middle District of Tampa.

On May 3, 1991, the Edwards filed a motion to enforce the terms of the supersedeas bond against Northbrook in the United States District Court for the Northern District of Texas pursuant to Rule 65.1 of the Federal Rules of Civil Procedure. In their motion, the Edwards sought recovery only from Northbrook; they did not seek any recovery from Celotex or from Celotex's property. Celotex nevertheless opposed the motion, arguing that

the Edwards' motion was a "proceeding against the debtor" and sought "property of the [debtor's] estate" in violation of the automatic bankruptcy stay, 11 U.S.C. § 362(a). Celotex also pointed out that five days after its bankruptcy filing, the bankruptcy judge, exercising the "equitable powers" conferred on him by section 105(a) of the Bankruptcy Code, "extended" the automatic stay by enjoining all proceedings "involving" Celotex, even those in which "a supersedeas bond has been posted." Celotex App. 28; Northbrook App. 35. Northbrook also opposed the Edwards' motion, urging the same arguments as those advanced by Celotex. Neither Celotex nor Northbrook contended that the conditions for triggering Northbrook's obligation under the bond had not been satisfied.

The Edwards contended that the automatic stay did not prevent the district court from granting their motion to enforce Northbrook's obligation under the supersedeas bond, because the motion neither sought relief from Celotex nor sought possession of any property of Celotex. The Edwards also argued that the bankruptcy court in Florida had no jurisdiction or power to enjoin enforcement of the terms of a supersedeas bond against Northbrook, since Celotex had no property interest in the bond. The district court agreed with the Edwards, and ordered that the Edwards could execute on the bond. Celotex, but not Northbrook,[1] appealed the order allowing execution on the bond to the Fifth Circuit.

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[1] Respondents oppose the petition of Northbrook Property and Casualty Insurance Company for leave to intervene as a party for the purpose of filing its own petition for certiorari. It is true that by affirming the order of the district court allowing

The Fifth Circuit affirmed in a published opinion. *Edwards v. Armstrong World Industries, Inc.*, 6 F.3d 312 (5th Cir. 1993). Citing the opinion of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993) and the bankruptcy court's own opinion in *In re Celotex Corp.*, 128 B.R. 478 (Bankr.M.D.Fla. 1991), the Fifth Circuit found that the Edwards' motion did not implicate property in which Celotex had an interest, and thus rejected Celotex's contention that the bankruptcy court had exclusive jurisdiction over claims involving the bond. 6 F.3d at 315; Celotex App. 6-8; Northbrook App. 5-6. Because Celotex's property was not involved in the Edwards execution attempts, the Fifth Circuit found that the automatic stay did not prevent enforcement of the bond obligation against Northbrook. 6 F.3d at 315; Celotex App. 6-8; Northbrook App. 5-6.

Respondents to execute on a supersedeas bond against Northbrook, the judgment of the court of appeals directly affects Northbrook. However, Northbrook did not appeal the order of the district court or attempt to participate as a party in the court of appeals, apparently believing that Celotex would adequately represent its interests on appeal. Northbrook has made no showing of the type of extraordinary circumstances which would allow it to participate as a party at this stage of the proceedings despite its failure to participate as a party below. Northbrook's petition for leave to intervene, and its petition for writ of certiorari, should therefore be summarily denied.

Respondents do not, however, oppose Northbrook's suggestion in the alternative that its petition for certiorari be treated as an *amicus curiae* brief in support of Celotex's petition for writ of certiorari.

Turning to the "more difficult issue" raised by Celotex's appeal, the Fifth Circuit then considered whether the equitable powers conferred on the bankruptcy court by section 105(a) of the Bankruptcy Code allowed the bankruptcy court to interfere with the Edwards' attempt to collect from Northbrook, a stranger to the Celotex bankruptcy, in federal court in Texas.

The Fifth Circuit found that the bankruptcy court was without power to enjoin collection attempts against non-debtors that do not implicate the debtor's property, and thus held that the district court was correct in ordering execution on the supersedeas bond notwithstanding the injunction. The court acknowledged that section 105(a) generally authorizes bankruptcy courts to enjoin proceedings that threaten the integrity of a bankrupt's estate, but observed that "the integrity of the estate is not implicated in the present case because the debtor has no present or future interest in this supersedeas bond." 6 F.3d at 320; Celotex App. 19; Northbrook App. 16. The court concluded that "[w]hatever the ultimate scope of section 105, it does not extend so far as to give the bankruptcy court authority over a supersedeas bond in which it has no interest." *Id.* The Fifth Circuit expressly acknowledged that its holding conflicted with that of the Fourth Circuit in *Willis*, in which the Fourth Circuit reversed an order nearly identical to the order involved in the instant case based on the Celotex bankruptcy court's section 105(a) stay order. 6 F.3d at 320; Celotex App. 19; Northbrook App. 16.[2]

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[2] Judge Jones issued a concurring opinion in which she noted that because the bankruptcy court's section 105(a) stay

In denying Celotex's motion for rehearing and suggestion for rehearing en banc, the Fifth Circuit took the opportunity to explain that it had not reversed an order of a bankruptcy court in a different circuit (as claimed by Celotex), but had instead affirmed an order by an inferior court within its jurisdiction which was premised on a finding that the bankruptcy court's order was ineffective. Thus, the Fifth Circuit panel observed, "we have not held that the bankruptcy court in Florida was necessarily wrong; we have only concluded that the district court, over which we *do* have appellate jurisdiction, was right." 6 F.3d at 321; Celotex App. 22 (emphasis added).

ARGUMENT

The Edwards agree with Petitioners Celotex and Northbrook that the Fifth Circuit's decision in this case upholds a collateral attack on a stay order issued by a bankruptcy judge in another circuit. The Edwards also agree with Petitioners that the decision in this case expressly and directly conflicts with the decision of the Fourth Circuit in *Willis v. Celotex Corp.*, 978 F.2d 146 (4th

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order did not by its terms enjoin proceedings against Northbrook, she would not reach the issue of whether the bankruptcy court had the power under section 105(a) to enjoin enforcement of supersedeas bonds against third parties. 6 F.3d at 321; Celotex App. 21; Northbrook App. 18. As the Fifth Circuit majority noted, however, in subsequent orders the bankruptcy court made clear that its order of October 17, 1990 was intended to, and did, enjoin collection attempts like those made by the Edwards against Northbrook in this case. 6 F.3d at 315 n.3, 318-19; Celotex App. 6 n.3, 15-16; Northbrook App. 5 n.3, 13.

Cir. 1992), *cert. denied*, 113 S.Ct. 1846 (1993). The Edwards disagree, however, with the contention of Petitioners that the Court must exercise its discretionary power of review to resolve these jurisdictional conflicts.

Celotex contends that the Fifth Circuit's order of affirmance must be reversed because "collateral attacks on orders in other circuits are impermissible," unless the aggrieved party first attacks the order in a direct appeal. Celotex Pet. at 16. Similarly, but more precisely, Northbrook asserts that this Court has established that "persons subject to an injunctive order issued by a court *with jurisdiction* are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." Northbrook Pet. at 15, quoting *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375, 386 (1980) (emphasis added). But neither Celotex nor Northbrook has presented a persuasive reason for reviewing the Fifth Circuit's order. Celotex's description of the law of judgments is simply inaccurate; this Court has expressly condoned the practice of collaterally attacking invalid court orders, particularly when the party complaining of the order was not a named party to the original proceeding. *See, e.g., Martin v. Wilkes*, 490 U.S. 755 (1989), upholding a collateral attack on a consent decree notwithstanding the plaintiffs' failure to intervene and appeal in the original action. Northbrook's statement of the law is more accurate, but less relevant; both the Edwards and the courts below deny that the injunctive order relied upon by Northbrook and Celotex was issued by a court "with jurisdiction," so as to bring the case within the rule against collateral attacks stated by this

Court in *GTE Sylvania*.[3] There is simply nothing novel or extraordinary in the Fifth Circuit's decision or reasoning which would warrant the exercise of discretionary review by this Court.

Northbrook complains that compliance with the Fifth Circuit's order would subject both Northbrook and the Edwards to the imposition of sanctions by the bankruptcy court for violating the bankruptcy court's stay order. Nothing in the bankruptcy court's stay order, however, suggests that Northbrook would be violating the order by passively permitting execution on the bond or even by voluntarily satisfying a demand for payment based on the Fifth Circuit's judgment.[4] Celotex App. 26-29; Northbrook App. 33-36. Northbrook's fear that the Edwards' attempt to enforce the Fifth Circuit's order may prompt the bankruptcy court to sanction the Edwards is more realistic, but Northbrook is hardly the appropriate party to raise this concern.

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[3] As the Fifth Circuit observed, "a generalized and theoretical concern for the bankrupt's estate" will not support the exercise of bankruptcy court jurisdiction over supersedeas bonds. 6 F.3d at 320; Celotex App. 20; Northbrook App. 17.

[4] What probably worries Northbrook is not that it may be held in contempt by the bankruptcy court for paying on the bond, but that it may pay on the bond and then be prevented from enforcing its rights against Celotex. But that is the risk that Northbrook assumed by issuing the bond. As the Fifth Circuit recognized, the very purpose of a supersedeas bond is to shift the risk of the judgment debtor's future insolvency from the prevailing plaintiff (here, the Edwards) to the surety (Northbrook). 6 F.3d at 319; Celotex App. 18; Northbrook App. 15.

Celotex attempts to portray this case as an apocalyptic "collision" between the type of adversarial, narrow-minded "litigation philosophies" that have "fueled the asbestos mess," exemplified by the Fifth Circuit's decision below, and the more equitable "bankruptcy philosophies" that would grant all creditors their "fair share" of what they are owed by a company that has been driven into bankruptcy by hundreds of thousands of claims, exemplified by the bankruptcy court's stay order. Celotex Pet. at 3-4, 11-12. In reality, this case simply involves the Fifth Circuit's recognition that a bankruptcy court's ability to accomplish what it believes to be a fair and socially desirable reorganization is limited, at a minimum, by its own jurisdiction. The Fifth Circuit itself observed that although "using the bankruptcy court as a clearing house for all of these cases may seem desirable as a policy matter, section 105(a) simply does not give bankruptcy courts authority over assets that are not property of the debtor's estate and in which the debtor has no interest." *Edwards*, 6 F.3d at 319; Celotex App. 17; Northbrook App. 14. This Court should come to the same conclusion in holding that its intervention in this case is unwarranted.

The Fifth Circuit correctly affirmed the district court's refusal to "bow in complete obeisance" (6 F.3d at 320, Celotex App. 20, Northbrook App. 17) to a bankruptcy court stay that the bankruptcy court had no jurisdiction or power to order. The Fifth Circuit accurately perceived that to honor the bankruptcy court's attempt to stay execution on supersedeas bonds "would eviscerate the very purpose of these bonds," 6 F.3d at 319, Celotex App. 17, Northbrook App. 14, and defeat the intent of

Rules 62(d) and 65.1 of the Federal Rules of Civil Procedure. Most importantly, the decision below correctly applies the law and does justice as between the parties. The conflict between the decision in *Willis* and the more recent, more thorough, better-reasoned opinion in *Edwards* should not induce this Court to exercise its discretionary power of review.

CONCLUSION

The Petitions for Writ of Certiorari should be denied.

Respectfully submitted.

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